BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.	Application 05-02-027 (Filed February 28, 2005)

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING, IN PART, MOTION TO COMPEL

This ruling grants, in part, the motion of Qwest Communications Corporation (Qwest) to the extent set forth herein. Qwest filed its motion on June 6, 2005, seeking an order to compel discovery responses from SBC Communications, Inc. (SBC) to its Data Request 1-2, attached to its motion as Attachment A.

Specifically, Qwest asks that:

> SBC be ordered to produce, no later than two business days after the issuance of this ruling, copies of all responses it has provided to any other party in this docket, except those relating to the National Synergies Model;
>
> SBC be prohibited from imposing restrictions on access to documents that are not contained in the Nondisclosure Agreement (NDA), including an "Outside Counsel Only" restriction; and

> SBC be prohibited, in all future data request responses, from interposing an objection based on the assertion that the material sought is confidential, proprietary, or competitively sensitive when the requesting party has executed SBC's NDA.

Response of SBC

SBC filed a response on June 10, 2005. SBC claims that it has offered to make available to Qwest's outside counsel and experts information and documents SBC has produced in response to other parties' data requests, except for information regarding the national and California synergy models in which Qwest expresses no interest.[1] SBC argues that these materials will allow Qwest to participate fully in these proceedings, while at the same time addressing SBC's legitimate concern with not disclosing competitively-sensitive information to employees of its competitors.

SBC claims that it was within its rights under the NDA (and California law) to refuse to grant competitors, like Qwest, unrestricted access to its competitively-sensitive information. Applicants acknowledge, however, that the ALJ's June 9, 2005 Ruling Regarding Competitively Sensitive Data (the "Ruling") orders them to provide responses to Qwest's outstanding data requests ("in accordance with the directives in this ruling." (Ruling at 8.) The Ruling permits Applicants to limit access to competitively-sensitive data to Qwest's outside counsel and consultants and permitted regulatory employees, as that term is

[1] See Declaration of William J. Dorgan in Support of Reply of SBC Communications, Inc. to Motion of Qwest Communications Corporation to Compel Responses to Qwest's First Set of Data Requests ("Dorgan Declaration" or "Dorgan Decl."), filed and served herewith, Ex. 1.

defined in the Ruling, subject to the restrictions of the NDA. SBC states that it will respond to Qwest's Data Request 1-2 in accordance with the Ruling.[2]

Quest's Third-Round Pleading In its third-round pleading, Qwest argues that although SBC promises to respond to Qwest Data Request 1-2 "in accordance with the [June 9] ruling, SBC "retrenches" from that promise by stating that the data should only be available to "outside counsel and consultants." (SBC Reply, p. 2.) Thus, while the June 9 ruling allows "permitted regulatory employees" as defined in the ruling, to review the confidential materials, SBC seeks to exclude such persons because they are excluded under the FCC protective order. Qwest thus opposes SBC's proposed exclusion of "permitted regulatory employees" arguing that such exclusion is contrary to the June 9 ruling.

Qwest further argues that the May 20, 2005 ALJ ruling regarding TURN's motion to compel is relevant in ruling upon the Qwest motion. In the May 20 ruling, the ALJ concluded that Applicants had not shown how the protection of highly confidential materials would be compromised by permitting TURN to make copies subject to the restriction of the NDA.

In their sur-reply, however, Applicants argue that neither the May 20th nor the June 9th ALJ Rulings provide support for Qwest's position. The May 20

[2] SBC does not understand the Ruling to affect the ALJ's May 20, 2005 order regarding the national synergies model, pursuant to which TURN and ORA, but no other parties, were granted access to the national synergies model under specified circumstances. Both XO and Qwest have stated that they have no need to access the national synergies model – which is logical since they do not represent ratepayers – and the Ruling does not purport to provide any parties in addition to TURN and ORA with access to the national synergies model.

Ruling did not state that "the 'no copies' rule is unreasonable" in all circumstances, but only addressed whether TURN's access to the national synergies model and related documents could be limited to a "No Copies" basis. Because TURN is not a competitor, Applicants argue, the circumstances under which the Competitors should be given access to Applicants' competitively-sensitive information were not before the ALJ when it ruled on May 20.

Applicants also point out that the June 9th ruling cites with approval a 1995 ruling[3] that endorsed a protective order with a "No Copies" provision. Applicants point out that, other than minor editorial changes, the NDA covering SBC's production of documents to Qwest contains an identical "no copies" provision. In the protective order negotiated between Pacific Bell and competitors in the 1995 proceeding, however, while a "No Copies" provision applied, the requesting party was able permitted to seek a ruling from the ALJ directing that copies be made.[4]

Applicants point out that Qwest executed an NDA with Applicants on May 13,2005, which authorizes Applicants to produce information on a "No Copies" basis, and claim that this "No Copies" provision is identical to the "No Copies" provision in the NDA cited in the June 9th ALJ Ruling.

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[3] *See* June 9th Ruling at 9 n.1 (citing ALJ Ruling November 16, 1995, in R.93-04-003 / I.93-04-021 entitled "ALJ Ruling Concerning Proposed Protective Order of GTE California Incorporated.")

[4] *Id.* at 11, n. 7.

Discussion

For the reasons outlined above, no blanket requirement shall be imposed on SBC to provide Qwest with paper copies of all highly confidential documents which SBC has designated as "No Copies." If Qwest continues to seek paper copies of any specific "No Copies" documents after viewing such copies, Qwest may seek relief from the ALJ, but must identify the specific documents for which it seeks paper copies, with justification as to why production of a paper copy is required.

SBC shall provide access to the documents to "permitted regulatory employees" of Qwest, as defined by the June 9th ruling, notwithstanding any differences that may be prescribed in the FCC protective order. SBC shall produce its response to Data Request 1-2 within two business days of this ruling.

Access to Documents Produced in the FCC Proceeding

The remaining unresolved dispute raised by Qwest's motion involves the terms under which parties may be allowed access to California-specific materials produced in the Federal Communications Commission (FCC) proceedings on the SBC's acquisition of AT&T and related affiliates. SBC indicates that the FCC has adopted two protective orders governing access to materials produced by Applicants in the FCC proceedings (see Exhibits 2 and 3 to the Dorgan Declaration appended to the SBC response). In the FCC's second protective order, the FCC allowed Applicants to limit access to "Highly Confidential" documents to outside counsel, consultants and experts. The FCC found that the Protective Order would "give appropriate access to the public while protecting a Submitting Party's competitively sensitive information, and will thereby serve the public interest." (Dorgan Decl. Ex. 3 at 1-2.)

As discussed in its June 3, 2005 reply to XO's comments,[5] Applicants have offered to make available in San Francisco (or Washington, D.C.) California-specific documents produced in the FCC proceedings, but subject to the confidentiality restrictions put in place in the FCC proceedings. SBC argues that if only outside counsel and consultants have access to the documents in the FCC, then only outside counsel and consultants should have access to the documents in these proceedings. SBC notes that TURN has agreed to review the FCC documents under these terms. (See Dorgan Decl. Ex. 4.) SBC extended the same offer to XO, and is awaiting final approval by XO. (*Id.*, Ex. 5 (June 7, 2005 email from XO's outside counsel), Ex. 6 (June 9, 2005 letter to XO's outside counsel).

SBC proposes that the remaining parties who request access to California-specific documents produced in the FCC proceedings likewise be given access to those documents under the restrictions applied by the FCC in its own protective orders. SBC argues that such an approach will ensure consistent treatment of competitively-sensitive documents in both proceedings, while allowing all parties to participate fully in these proceedings. Applicants submit that, because Qwest has retained two outside law firms to represent it in these proceedings, limiting disclosure of California-specific information produced in the FCC proceedings to these law firms and outside consultants does not impose any unreasonable hardship on Qwest.

Qwest argues that the restrictions adopted in the FCC's protective orders should not apply, arguing that "[t]here are significant differences in the process before the FCC and this Commission, such that the limitations here works a

[5] Reply to XO Cmts. at n.5.

serious prejudice to those parties who have staffed the case with in-house attorneys." (Motion at 5.)

Discussion

The issue before the Commission is how best to balance due process concerns with Applicants' and the public's interest in preventing the disclosure of competitively-sensitive information to Applicants' competitors. The Protective Order adopted in the FCC proceeding provides for different rules governing access compared with those that were adopted by the ALJ ruling on the XO Motion. The rules for access to confidential data in this proceeding are within the jurisdiction of this Commission and are not invalidated or modified by rules in other jurisdiction, such as the FCC. The fact that different rules have been adopted by the FCC does not automatically justify changing the rules adopted in this proceeding to conform with them.

Accordingly, the Applicants shall not be permitted to impose additional restrictions on access to the FCC documents that are not already set forth in the NDAs that have been executed by parties in this proceeding and consistent with the prior ALJ rulings issued in this proceeding.

IT IS RULED that the motion of Qwest Communications Corporation is granted, in part and denied in part in accordance with the discussion above.

Dated June 17, 2005, at San Francisco, California.

/s/ Thomas R. Pulsifer
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Administrative Law Judge's Ruling Granting, In Part, Motion to Compel by using the following service:

☒ E-Mail Service: sending the entire document as an attachment to all known parties of record who have provided electronic mail addresses.

☒ U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Dated June 17, 2005, at San Francisco, California.

/s/ Antonina V. Swansen
Antonina V. Swansen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.